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JAN 13 1975
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-6336

GEORGE HERMAN ROGERS,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y. 10005
Attorney for Amicus Curiae

MELVIN L. WULF
of Counsel

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Interest of *Amicus**

This brief is filed because the American Civil Liberties Union believes that petitioner's conviction in this case represents a serious violation of his First Amendment rights, and will generally have a serious inhibiting effect on speech which is critical of the President of the United States, whomever he might be. It was for this same reason that we filed an *amicus* brief in *Watts* v. *United States*, 394 U.S.

* This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk.

705, a case much like the one at bar. We believe the result in *Watts*—reversal of the conviction—dictates the result here.

ARGUMENT

This case presents the narrow question whether a conviction under 18 USC §871(a) for making a threat against the President of the United States can be constitutionally upheld where the only evidence is that petitioner, who had a long history of chronic alcoholism, made statements at an inn in Shreveport, Louisiana at the time of President Nixon's trip to China critical of the President's policies, ending with the utterances that he was "going to Washington and beat the ass off Nixon" and repeated this to police officers.

For these statements petitioner was charged and convicted on five counts and sentenced to imprisonment for five years on each count, to run concurrently, and also five years supervised probation—this despite the jury's recommendation of "extreme mercy."

The Court of Appeals for the Fifth Circuit in its affirmance (488 F.2d 512) did not consider any constitutional issues. The Court did not even describe the conduct it upheld as within the statute. It ruled only that it was not necessary that there be proof of any intention to carry out the threat, relying on *Roy* v. *United States,* 416 F.2d 874 (9th Circ.) and refusing to follow the contrary holding in *United States* v. *Patillo,* 438 F.2d 13 (4th Circ.).

We submit that the Constitution forbids punishment for verbal "threats" absent circumstances indicating an intent to carry them out and a possibility that the threat could be carried out. A sober appraisal of the circumstances

of this case should lead to the conclusion that what was expressed was not a threat at all, but merely contempt of Mr. Nixon.

Here was not the "true threat" referred to by this Court in *Watts* v. *United States,* 394 U.S. 705, 708. In considering whether any given statement can be called a real threat, the possibility of its accomplishment must be taken into account. Here that was, of course, absolutely out of the question. A stranger might be able to shoot a President (as indeed happened to several Presidents), but he could never get near enough to beat his ass.

What the Court said in *Watts* at page 708 is equally applicable here:

> "* * * For we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). The language of the political arena, like the language used in labor disputes, see *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53, 58 (1966), is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."

In short, we should not be so timorous as to allow a conviction such as this to stand.

CONCLUSION

The conviction constituted an impermissible abridgment of freedom of speech in violation of the First Amendment. We join petitioner in his request that his conviction be reversed and the charges dismissed.

Respectfully submitted,

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y. 10005
Attorney for Amicus Curiae

MELVIN L. WULF
of Counsel

January, 1975